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THE DESCENT AND DISTRIBUTION OF REAL AND PERSONAL PROPERTY IN KENTUCKY

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Among the most important statutory provisions both from the standpoint of the number of people that they affect and from their social significance, are those which pertain to the descent and distribution of real and personal property. Few people comprehend fully their meaning, or the consequences should they fail to execute a valid will.

These statutes vary greatly throughout the United States. Such a statute is difficult to draw, as the circumstances are likely to be different in each case that comes up. Yet, in drawing it, the legislature must be somewhat arbitrary, and attempt to draft one that will satisfy both social and individual interests. It would appear that a balance between the two is the ideal solution, but it is rare when this can be fully accomplished, and in case of a conflict perhaps the social interests of the community in general must be made to prevail over the individual interests.

It is the purpose of this paper to discuss the first five sections of the statutes on descent and distribution in Kentucky; cases which have been decided by the Court bearing upon their interpretation and manner of application; and to show wherein these statutes appear to work injustices and should, possibly, be changed. The statutes of other states will be used and discussed to show in what manner other states have met the problem, and have felt it advisable to handle the subject. In anticipation, it might be said that it appears that the Kentucky statutes on the whole subject do not measure up to the present day standards existing in many other states. The chapter in the Kentucky statutes pertaining to this subject is numbered 391. One section of the following chapter, 392.020, will be discussed in this connection.

THE DESCENT OF REAL PROPERTY IN KENTUCKY

The first section which will be discussed is the one dealing with the descent of real property. It is important that we have

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a picture of the statute in our minds when we talk about the decisions pertaining to it, and the significance of its various items. The Kentucky Revised Statutes, section 391.010, reads as follows:

> "When a person having right or title to any real estate of inheritance dies intestate as to such estate, it shall descend in common to his kindred, male and female, in the following order, except as otherwise provided in this chapter:
>
> "(1) To his children and their descendants; if there are none, then
>
> "(2) To his father and mother, if both are living, one moiety each; but if the father is dead, the mother, if living, shall take the whole estate; if the mother is dead, the whole estate shall pass to the father; if there is no father or mother, then,
>
> "(3) To his brothers and sisters and their descendants; if there are none, then
>
> "(4) One moiety of the estate shall pass to the paternal and the other to the maternal kindred, in the following order;
>
> "(a) The grandfather and grandmother equally, if both are living; but if one is dead, the entire moiety shall go to the survivor; if there is no grandfather or grandmother, then
>
> "(b) To the uncles and aunts and their descendants; if there are none, then
>
> "(c) To the great-grandfathers and great-grandmothers, in the same manner prescribed for grandfather and grandmother by subsection (a); if there are none, then
>
> "(d) To the brothers and sisters of the grandfathers and grandmothers and to their descendants; and so on in other cases without end, passing to the nearest lineal ancestors and their descendants.
>
> "(5) If there is no such kindred to one of the parents as is described in subsection (4), the whole shall go to the kindred of the other. If there is neither paternal nor maternal kindred, the whole shall go to the husband or wife of the intestate; or, if the husband or wife is dead, to the kindred of the husband or wife, as if he or she had survived the intestate and died entitled to the estate."

Let us note first some of the rather obvious points about this statute. It provides for the children of the decedent and their descendants in its first subsection, but does not consider the surviving spouse until all other kindred of the intestate have had a chance to claim the property. There is no provision for escheat to the state in this statute, and although there is an escheat statute in Kentucky[1] it does not take effect until all pos-

[1] KY. R. S. sec. 393.020.

sible relatives of the decedent have had a chance to claim the property.

Ellis v. *Dixon*[2] illustrates the above point. There the plaintiff, a distant cousin of the decedent, who had never seen, known, or communicated with him, attempted to prove her relationship and thus cut off the wife's interest. Ample evidence was presented by the wife and witnesses for her to the effect that decedent had made the remark innumerable times that he had no relatives in this country, or in England, which he had left when a boy. The plaintiff, also of English birth, fortunately, was not able to prove her relationship to the decedent to the satisfaction of the Court. Consider carefully, however, the social and individual injustices which the Kentucky statute as it now stands is capable of producing. It is absurd, to say the least, for a statute to be so framed that a wife (or husband, as the case may be) may be cut off with only a life interest in one-third of her husband's real property, while a stranger may be permitted to inherit a fee in the entire estate.

On interpretation of the wording of the statute, the Court of Appeals has held that the words "real estate" or "land" as used therein shall be construed to mean "lands, tenements, and hereditaments and all rights thereto and interests therein, other than a chattel interest."[3] "Moiety" as so used means one half of the estate and not the whole thereof.[4] The words "children" and "issue" have also been interpreted to mean not only those born in lawful wedlock of the intestate and another, but to include all children and issue as by law have been made capable of inheriting from the intestate.[5] Thus one legally adopted by A but not by A's subsequent wife could take from A but not from his wife. However, while an adopted child is capable of inheriting from the one who adopts him, the adoption does not make him capable of inheriting from other persons who may leave property that the adopting parent and his heirs legally inherit under the statute.[6] It has further held that children

[2] 294 Ky. 609, 172 S. W. 2d 461 (1943).
[3] Graves v. Spurr, 97 Ky. 651, 659, 31 S. W. 483, 485 (1895).
[4] Young v. Smithers, 181 Ky. 847, 205 S. W. 949 (1918).
[5] Drain v. Violett, 65 Ky. (2 Bush) 155 (1867).
[6] Sanders v. Adams, 278 Ky. 24, 128 S. W. 2d 223 (1939).

adopted in other states under statutes similar to the Kentucky statute may take under the Kentucky statute of descent.[7]

While many states have abolished estates of dower and curtesy,[8] they still exist in Kentucky,[9] the surviving spouse being entitled to a life estate in one-third of all of the realty of the intestate and to one-half of all of the personalty of the intestate absolutely. Other states which, like Kentucky, have made no substantial provision for the surviving spouse under their statutes of descent and distribution still provide for dower and curtesy in varying amounts.[10] Under the Kentucky statute the Court has held that the children of an intestate acquire an absolute fee in his lands, subject only to the life interest of their surviving parent.[11] Thus they may bring an action of trespass against one who by contract with said surviving parent has been given the right to enter upon the land and cut trees thereon.[12]

As would be expected, the persons who inherit under the statute, while they take a fee in the lands, take it subject to any liens thereon, such as those created by mortgages.[13] The statute applies to all property of the intestate which he has not disposed of by any will which he may have left.[14] Further, the Court

[7] Pyle v. Fischer, 278 Ky. 287, 128 S. W. 2d 726 (1939).

[8] COLO. STAT. ANN. (1935) chap. 176, sec. 1; ANN. CODE OF GA. (Park, 1914) sec. 3670 (curtesy abolished); IND. STAT. ANN. (Burns, 1933) sec. 6-2353; REV. STAT. OF ME. (1930) chap. 89, sec. 8; COMP. STAT. OF NEB. (1929) chap. 30, sec. 104; N. M. STAT. ANN. (1941) sec. 31-123; N. Y. REAL PROP. LAW (Thompson, 1939) chap. 52, secs. 189, 190; COMP. LAWS OF N. D. (1913) sec. 4414; OKLA. STAT. (1941) chap. 32, sec. 9; S. D. CODE (1939) sec. 56.0103; UTAH CODE ANN. (1943) sec. 101-4-9; REV. STAT. OF WASH. (Remington, 1932) sec. 1343; WYO. REV. STAT. ANN. (1931) sec. 88-4001.

Dower and curtesy have also been abolished in England. Administration of Estates Act, 1925, 15 Geo. 5, c. 23, sec. 45 (1) (b), (c).

[9] KY. R. S. secs. 392.020, 392.010.

[10] STAT. OF ARK. (1937) secs. 80, 90; FLA. STAT. (1941) sec. 731.34 (dower only); ANN. CODE OF GA. (Park, 1914) sec. 5247 (dower only); CODE OF IOWA (1939) chap. 508, secs. 11990, 11991; REV. STAT. of N. J. (1937), secs. 3:37-1, 3:37-2; OHIO GEN. CODE ANN. (Page, 1938) sec. 10502-1; ORE. COMP. LAWS (1940) secs. 17-101, 17-401; GEN. STAT. OF N. C. (1943) secs. 30-4, 30-5, 52-16; TENN. CODE ANN. (Williams, 1934) secs. 8351, 8353.

[11] Campbell v. Wells, 278 Ky. 209, 128 S. W. 2d 592 (1939).

[12] Kentucky Stave Co. v. Page, 125 S. W. 170 (Ky. 1910).

[13] Maxwell's Committee v. Cent. Per. Bldg. and Loan Association, 131 Ky. 18, 114 S. W. 324 (1908).

[14] Fox v. Burgher, 285 Ky. 470, 148 S. W. 2d 342 (1941); Todd v. Gentry, 109 Ky. 704, 60 S. W. 639 (1901).

has refused to uphold the doctrine of worthier title, so that where a will devises property according to the statute of descent the devisees take under the will and not under the statute.[15] Should all of the devisees under a will make an agreement that the will should not be probated, so that they can have equal distribution of the estate among themselves, such an agreement is valid and binding and they will take under the statute by virtue of the agreement.[16] If a testator should make a provision in his will for a contingent reversion to his estate of certain property, the provision is valid, and such property upon reverting to the estate, becomes a part of the estate and passes according to the statute of descent.[17]

In *Ellis* v. *Dixon*,[18] mentioned above, there is an interesting exception to the hearsay rule, the Court admitting in evidence declarations as to family pedigree and history when the declarant was dead and was related by blood or affinity to the family whose genealogy was under inquiry. The Court has also held in Montz v. Schwabacher[19] that there is a legal presumption that every decedent has heirs, but that it is rebuttable either by lapse of time accompanied by the non-appearance of heirs, or by proof of the fact that there are none. A mere unsupported statement that there are no heirs is not sufficient to rebut such a presumption.[20] As to how long a time must elapse to rebut the presumption that there are heirs is left in doubt in this case. The wife of the decedent had been dead for five years, and yet the Court stated that this was not "such lapse of time as would rebut (the) . . . presumption"[21] that the wife left heirs. Certainly this is a strange decision. It would seem that if a person's relatives are not sufficiently interested in him to make their whereabouts known before the lapse of a five year period, they should deserve little consideration under this statute. It appears to this writer that the stipulation that heirs must appear within a reasonable time would be more judicious

[15] Copeland v. State Bank and Trust Co., 300 Ky. 432, 188 S. W. 2d 1017 (1945).

[16] *See*, Henry v. Spurlin, 277 Ky. 114, 125 S. W. 2d 992 (1939); *cf.* Evans, *Certain Evasive and Protective Devices Affecting Succession to Decedents' Estates* (1933) 32 MICH. L. REV. 478, 480.

[17] Hardesty v. Coots, 287 Ky. 675, 155 S. W. 2d 8 (1941).

[18] 294 Ky. 609, 172 S. W. 2d 461 (1943).

[19] 119 Ky. 256, 83 S. W. 569 (1904).

[20] *Ibid.*

[21] *Id.* at 260, 83 S. W. 569, 570.

than to allow the settling of estates to be stalled over a long and unnecessary period of time, for such a stalling may result in a wasting or even loss of the estate. Perhaps it would not be injudicious to say that a reasonable time is one year; but regardless of how the term "reasonable" is interpreted, it should not be so interpreted that a husband or wife would have to wait longer than, or as long as, five years for the appearance of heirs.

DISTRIBUTION PER STIRPES

A statute which must be read in connection with the section just considered is Kentucky Revised Statutes, section 391.040, which is as follows:

> "When any or all of a class first entitled to inherit are dead, leaving descendants, such descendants shall take per stirpes the share of their respective deceased parents."

Kentucky is one of a very few states which have a provision for *per stirpes* distribution, the other states being Arkansas,[22] Colorado,[23] Delaware,[24] Florida,[25] and Rhode Island.[26]

Let us consider briefly just what is the import of such a provision. Take for example, the case of one A, who dies without a validly executed will, leaving surviving him ten grandchildren, the children of two deceased sons, B and C. One grandchild is the child of son B, and the other nine grandchildren are the children of son C. Under this statute B's child will inherit one half of all of the estate left by A, while the other nine grandchildren will have to be content with one eighteenth each of the total estate of A. The question immediately arises, would the owner desire such a consequence? Presumably a person has the same affection for one grandchild as he does for another and would want them all to share equally in his estate if all of his children have predeceased him. It would seem also so far as collaterals are concerned that this statement would apply equally to a person's nieces and nephews should his brothers and sisters all have predeceased him leaving issue entitled to inherit, as well as to all other cases in which the degree of relation-

[22] STAT. OF ARK. (1937) sec. 4338.
[23] COLO. STAT. ANN. (1935) chap. 176, sec. 1.
[24] REV. CODE OF DEL. (1935) sec. 3731.
[25] FLA. STAT. (1941) sec. 731.25.
[26] GEN. LAWS OF R. I. (1938) chap. 567, sec. 5.

ship of all of the survivors who are entitled to inherit is equal, and they are in the same class.

Some would argue at this point that had the decedent intended that they should take other than by the statute he would have left a will with his express directions in it. But this is a fallacious and inconclusive argument as the very great majority of the population do not understand the full import of these statutes on descent, in fact, it is entirely possible that they do not realize that such statutes exist. Even if they should so realize, or think about it at all, they probably reason somewhat along the line that the legislature and the courts support the statutes, therefore they are correct and promote our best interests. This writer offers as a maxim or general principle that when the lineal heirs of a decedent are related to him in equal degree, the inherited portions of all the heirs should be equal one to the other. Respecting collateral inheritance *per stirpes* and *per capita,* it would appear that the latter is generally adopted.[27] It might be more difficult, however, to frame a maxim in this case as we might sometimes wish to prefer one collateral to another even though they stand in equal degree to the intestate. Thus where an uncle and a nephew are the next of kin, it might be desirable from a social and economic standpoint to prefer the nephew to the uncle.

The large majority of the states have provided by statute that where the heirs who are eligible to share under the statute of descent are all of the same degree of relationship from the decedent they will share equally, that is *per capita,* rather than *per stirpes,* as in Kentucky.[28]

REPRESENTATION

Before we go further in our discussion it would be wise to have a definition of the term "representation" clearly fixed in our minds. It has been variously defined, and sometimes inac-

[27] ARIZ. CODE ANN. (1939) chap. 39, sec. 108; PROBATE CODE OF CALIF. (1937) secs. 221, 222; IDAHO CODE ANN. (1932) sec. 14-103; IND. STAT. ANN. (Burns, 1933) sec. 6-2302; REV. STAT. OF ME. (1930) chap. 89, sec. 1; GEN. LAWS OF MASS. (1932) chap. 190, sec. 3; COMP. LAWS OF MICH. (1929) sec. 13440; MINN. STAT. (1941) sec. 525.16; N. Y. DECEDENT ESTATE LAW (Thompson, 1939) chap. 18, sec. 83; GEN. STAT. OF N. C. (1943) sec. 28-149; TEX. STAT. (Vernon, 1936) sec. 2577; VA. CODE ANN. (1942) sec. 5266; W. VA. CODE ANN. (1943) sec. 4082.

[28] *Id.*

curately.[29] Many people confuse the term "representation" with *per stirpes* distribution, but technically speaking, it is only one phase of it. Thus if A dies and leaves a son B and two grandchildren, the children of a deceased son C, the grandchildren will take the share of their parent, or one half of the estate between them, while B will take the other half. If, however, B is also deceased, and leaves a child, the three grandchildren of the decedent will all stand in equal degree to the decedent and take as heirs in their own right and not by representation of their parents, as the two grandchildren took in the first example. Such a taking by the grandchildren, in the second example, may be either *per capita* or *per stirpes,* but it is not by representation. To state it another way, when one or more persons stand in the place of another, as an heir, or in the right of succeeding to an estate of inheritance, they are said to represent that person who was entitled to inherit. Representation means the standing in the shoes of one's deceased parent and so is always lineal, though the inheritance might be from a collateral source. It runs vertically and not horizontally, so that a brother, for instance, can not stand in the shoes of a deceased sister, and take her share. There is a theory of *per stirpes* distribution which holds that there is no taking *per stirpes* except where there are different generations to take.[30] This theory however, is probably not the usual one, and very definitely is not the one adhered to in Kentucky.

Under the English law, prior to 1926, even the collateral descendents of an intestate to the remotest degree, as in Kentucky, stood in the place of their parent or ancestor, and took *per stirpes* the share which he or she would have taken.[31] This rule was changed by the Administration of Estates Act of 1925 so that today in England all members of a class share

[29] Compare 26 C. J. S., Descent and Distribution, sec. 23 (taking by representation means taking *per stirpes*), with 16 AM. JUR., Descent and Distribution, sec. 42 and White, *Per Stirpes or Per Capita* (1939) 13 U. OF CIN. L. REV. 298, 300 citing Reeve, DESCENT (1825) Introduction, p. 14 ("When the claimants are all in the same degree of kindred, they take as next of kin, but when one or more of the claimants are more remote than others in kindred, they take by representation, *per stirpes,* what their parents would have taken.").

[30] White, *Per Stirpes or Per Capita* (1939) 13 U. OF CIN. L. REV. 298, 299.

[31] 10 HALSBURY, LAWS OF ENGLAND (2d ed., 1933) 602.

equally, and the share of any lineal descendant who predeceases the testator is taken by his children or remoter issue equally, among them *per stirpes,* but contingent upon their attaining the age of twenty-one, or marrying thereunder.[32]

The rule as to representation varies in this country,[33] and can be classified as follows:

(1) A number of the states provide that there shall be representation only among lineal descendants.[34]

(2) Others provide that there shall be representation among lineal descendants, but among collaterals only with the issue of brothers and sisters and not further.[35]

(3) Pennsylvania follows the last rule, but also allows representation among the children of uncles and aunts.[36]

(4) Georgia provides that there shall be no representation further than the grandchildren of collaterals.[37]

It is the opinion of this writer that the rule stated in the second category is a desirable one, and that it will work the justice that is required.

DISTRIBUTION BETWEEN THE WHOLE AND THE HALF BLOOD

Yet another section in this chapter on descent and distribution in the Kentucky Revised Statutes seems not to produce the fairest results. It is numbered 391.050 and reads as follows:

> "Collaterals of the halfblood shall inherit only half as much as those of the wholeblood, or as ascending kindred, when they take with either."

The English Canons of Descent excluded the half blood entirely,[38] but the civil law gave an equal share to the whole

[32] *Id.* at 582, note (h). England: Administration of Estates Act, 1925, 15 Geo. 5, c. 23, sec. 47 (1) (i).

[33] For a good discussion of the various statutes in this country on the subject of representation see, 4 VERNIER, AMERICAN FAMILY LAWS (1936) 112-128.

[34] ANN. CODE OF MD. (Flack, 1939) art. 93, secs. 134, 137, 138; REV. STAT. MO. (1939) sec. 310; REV. CODES OF MONT. ANN. (1935) sec. 7073; COMP. STAT. OF NEB. (1929) chap. 30, sec. 102; NEV. COMP. LAWS (Hillyer, 1929) sec. 9859; COMP. LAWS OF N. D. (1913) sec. 5743; OHIO GEN. CODE ANN. (Page, 1938) sec. 10503-4; ORE. COMP. LAWS (1940) sec. 16-101; S. D. CODE (1939) sec. 56.0104; UTAH CODE ANN. (1943) sec. 101-4-5; WIS. STAT. (1943) sec. 237.01.

[35] CODE OF ALA. (1940) chap. 16, secs. 2, 3; ILL. REV. STAT. (1937) chap. 39, sec. 1; MISS. CODE ANN. (1942) sec. 468; REV. LAWS OF N. H. (1942) chap. 360, sec. 3; N. Y. DECEDENT ESTATE LAW (Thompson, 1939) chap. 18, sec. 83; CODE OF LAWS OF S. C. (1942) sec. 8906.

[36] PA. STAT. (Purdon, 1936) chap. 20, sec. 67.

[37] ANN. CODE OF GA. (Park, 1914) sec. 3931.

[38] ATKINSON, HANDBOOK ON THE LAW OF WILLS (1937) 34-35.

and half blood.[39] Most of the states provide that relations of the half blood shall share equally with those of the whole blood;[40] while some of the states following the above rule make an exception in the case of property which came to the decedent by way of gift, devise, or bequest from one of the ancestors of the decedent, in which case all those of the half blood on whose side the relationship did not exist are excluded.[41] Some statutes exclude the heirs of the half blood if there are heirs of the whole blood living.[42] (This may well raise the question of how far representation is, or should be, carried under such a statute.) Only a few of the states provide, like Kentucky, that those of the half blood shall take only one half the share of those of the whole blood.[43] Even these states differ from the Kentucky statute, however, in that it applies only to collaterals of the half blood.

Which of the states seem to have the best statute on the manner of sharing between those of the whole and those of the half blood? All sorts of cases and circumstances are conceivable. Suppose that A and B are half brothers, C is A's brother of the whole blood and B's brother of the half blood. There is only a year's difference in their ages. They are raised together, and are as close to one another as brothers of the whole blood. Why should A and B not share equally in the estate of C regardless of the source of C's property? It is the opinion of this writer that there should be no distinction in the share that the whole and the half blood take in a decedent's estate

[39] *Id.* at 35.

[40] STAT. OF ARK. (1937) sec. 4349; ILL. REV. STAT. (1937) chap. 39, sec. 1; GEN. STAT. OF KAN. ANN. (Corrick, 1935) sec. 22-128; REV. STAT. OF ME. (1930) chap. 89, sec. 2; ANN. CODE OF MD. (Flack, 1939) art. 93, sec. 138; GEN. LAWS OF MASS. (1932) chap. 190, sec. 4; N. Y. DECEDENT ESTATE LAW (Thompson, 1939) chap. 18, sec. 83; COMP. LAWS OF N. D. (1913) sec. 5752; OHIO GEN. CODE ANN. (Page, 1938) sec. 10503-4; OKLA. STAT. (1941) chap. 84, sec. 222; ORE. COMP. LAWS (1940) sec. 16-204; S. D. CODE (1939) sec. 56.0113; UTAH CODE ANN. (1943) sec. 101-4-17; PUB. LAWS OF VT. (1933) sec. 2967; WIS. STAT. (1943) sec. 237.03; WYO. REV. STAT. ANN. (1931) sec. 88-4003.

[41] CODE OF ALA. (1940) chap. 16, sec. 5; PROBATE CODE OF CALIF. (1937) sec. 254; COMP. LAWS OF MICH. (1929) sec. 13444; MINN. STAT. (1941) sec. 525.17.

[42] GEN. STAT. OF CONN. (1930) sec. 4982; IND. STAT. ANN. (Burns, 1933) sec. 6-2306; REV. STAT. OF N. J. (1937) secs. 3:3-5, 3:3-7.

[43] ARIZ. CODE ANN. (1939) sec. 39-105; FLA. STAT. (1941) sec. 731.24; REV. STAT. MO. (1939) sec. 309; TEX. STAT. (Vernon, 1936) sec. 2573; VA. CODE ANN. (1942) sec. 5265.

regardless of source, whether they are lineal or collateral relations.

ANCESTRAL ESTATES

Yet another section of the Kentucky statutes on descent which is likely to bring about an undesirable social and individual result is the one which pertains to ancestral estates.[44] It is numbered 391.020 and reads as follows:

> "(1) When a person dies intestate and without issue, owning real estate of inheritance which is the gift of either of his parents, the parent who made the gift, if living, shall inherit the whole of such estate.
>
> "(2) If an infant dies without issue, having the title to real estate derived by gift, devise or descent from one of his parents, the whole shall descend to that parent and that parent's kindred, and if there is none, then in like manner to the other parent and his kindred. The kindred of one parent shall not be so excluded by the kindred of the other parent, if the latter is more remote than the grandfather, grandmother, uncles and aunts of the intestate and their descendants."

No other state seems to have a provision quite like this one, although Rhode Island has a similar provision which states that where property is acquired by gift, devise, or descent from a parent or other kindred, it shall descend to the blood of that kindred.[45] A number of states, however, do have provisions to the effect that should an infant inherit from one of his parents and then die under age, that the property so inherited will descend to the children of such parent and their heirs by representation.[46]

Let us consider briefly whether the Kentucky statute is one which will bring about a desirable result, and some of the situations that are likely to arise under it. For example there is A, an infant, who inherits land from his father. A dies and leaves no issue, but leaves a mother who has no property and little means of supporting herself. A's paternal grandparents are not living, and his aunts and uncles on the paternal side all

[44] For a discussion of this subject in Kentucky, see, Evans, *The Ancestral Estate Law of Kentucky* (Sept., 1943) 7 KY. STATE BAR J. 15.

[45] GEN. LAWS OF R. I. (1938) chap. 567, sec. 6.

[46] MINN. STAT. (1941) sec. 525.16; REV. CODES OF MONT. ANN. (1935) sec. 7073; COMP. STAT. OF NEB. (1929) chap. 30, sec. 102; NEV. COMP. LAWS (1929) sec. 9859; COMP. LAWS OF N. D. (1913) sec. 5743; OKLA. STAT. (1941) chap. 84, sec. 213; S. D. CODE (1939) sec. 56.0104; REV. STAT. OF WASH. ANN. (Remington, 1932) sec. 1341; WIS. STAT. (1943) sec. 237.01.

have substantial incomes. Under the above statute said uncles and aunts will take the property inherited by A from his father, and his mother, who is closer to him and more in need of aid than the said uncles and aunts, will not be allowed any part of the property so inherited from the father. Regardless of economic circumstances, it seems only proper and fair that the close blood relative should take in preference to the more remote relative. While the situation depicted may seem to be extreme there have been cases presenting these facts and the decision suggested.[47]

A fairly recent Kentucky case gave to the paternal grandmother at the death of an infant grandson, whose father and grandfather had predeceased him, all of his property which he had inherited from his father to the exclusion of his mother.[48] It has also been held that where land comes from the father, the paternal cousins will be preferred to half brothers and sisters on the maternal side;[49] and that where land descends from the mother a maternal grandfather will be preferred to a father.[50]

Absurd results are reached if such a statute is strictly adhered to, as it apparently is in Kentucky. It would appear to be a good example of the remaining elements of the common law theory of descent of land which still persist in outmoded parts of our law today. Is it necessary to carry them on when the purposes for which they were created no longer exist? Certainly it can reasonably be said that in the greatest number of cases an infant's surviving parent is closer to him than his uncles or aunts or his grandparents and their heirs, and it seems fairer to allow the surviving parent to inherit even though the land may have descended from the infant's deceased parent. Had the infant,[51] or major intestate, as the

[47] Lamar v. Crosby, 162 Ky. 320, 172 S. W. 693 (1915); Weisiger v. McDonald, 116 Ky. 862, 76 S. W. 1080 (1903).

[48] Carr v. Hart, 232 Ky. 37, 22 S. W. 2d 432 (1929).

[49] Pulliam v. Parriss, 187 Ky. 844, 220 S. W. 1075 (1920).

[50] Carr v. Hart, 232 Ky. 37, 22 S. W. 2d 432 (1929); Connell v. Cantrill, 202 Ky. 406, 259 S. W. 1017 (1924).

[51] KY. R. S. sec. 394.030 reads, "No person under twenty-one years of age can make any will, except in pursuance of a power specially given to that effect, and except also, that a father, though under twenty-one years of age, may by will appoint a guardian for his child." As to the power of infants generally to make wills, see 1 PAGE, THE LAW OF WILLS (1926) secs. 128, 129.

case may be, wished to will realty which had descended to him from a parent to other than those relatives specified in the above statute, he might legally have done so, in fact, he probably would have done so had he understood this statute.

As stated by Dean Evans, the statute appears ". . . to be wholly out of harmony with present day concepts . . . (and) should be blotted out and remembered again no more forever."[52]

INHERITANCE OF PERSONAL PROPERTY

While many of the states combine their statutes on the descent of real and personal property,[53] there are many of the states which have some sort of variation between the two. Thus Kentucky Revised Statutes, section 391.030, reads:

> "(1) Where any person dies intestate as to his personal estate, or any part thereof, the surplus, after payment of funeral expenses, charges of administration and debts, shall pass and be distributed among the same persons, and in the same proportions, to whom and in which real estate is directed to descend, except as follows:
>
> "(a) The personal estate of an infant shall be distributed as if he had died after full age.
>
> "(b) An alien may be a distributee as though he were a citizen.
>
> "(c) Personal property or money on hand or in bank to the amount of $750 shall be exempt from distribution and sale and shall be set apart by the appraisers of the estate of an intestate to his widow and infant children, or, if there is no widow, to his infant children surviving him. A like amount of property or cash shall

[52] *Supra* note 44.

[53] ARIZ. CODE ANN. (1939) chap. 39, secs. 101, 102; STAT. OF ARK. (1937) sec. 4338; PROBATE CODE OF CALIF. (1937) secs. 201, 201.5 (as to community property), secs. 221-236 (as to separate property); COLO. STAT. ANN. (1935) chap. 176, sec. 1; GEN. STAT. OF CONN. (1930) secs. 4980, 4982; FLA. STAT. (1941) sec. 731.23; ANN. CODE OF GA. (Park, 1914) sec. 3931; IDAHO CODE ANN. (1932) sec. 14-103; ILL. REV. STAT. (1937) chap. 39, sec. 1; IND. STAT. ANN. (Burns, 1933) secs. 6-2301, 6-2324; CODE OF IOWA (1939) chap. 508, sec. 11986; GEN. STAT. OF KAN. ANN. (Corrick, 1935) sec. 22-130; REV. STAT. OF ME. (1930) chap. 89, sec. 20; ANN. CODE OF MD. (Flack, 1939) art. 46, sec. 1; GEN. LAWS OF MASS. (1932) chap. 190, sec. 2; MINN. STAT. (1941) sec. 525.16; MISS. CODE ANN. (1942) sec. 472; REV. STAT. MO. (1939) sec. 306; REV. CODE OF MONT. ANN. (1935) sec. 7072; N. Y. DECEDENT ESTATE LAW (Thompson, 1939), chap. 18, sec. 83; GEN. STAT. OF N. C. (1943) sec. 28-149; COMP. LAWS OF N. D. (1913) sec. 5743; OHIO GEN. CODE ANN. (Page, 1938) sec. 10503-4; ORE. COMP. LAWS (1940) sec. 16-102; CODE OF LAWS OF S. C. (1942) sec. 8906; S. D. CODE (1939) sec. 56.0104; TEX. STAT. (Vernon, 1936) sec. 2570; WYO. REV. STAT. ANN. (1931) sec. 88-4001.

> be exempt from distribution and sale and shall be set apart by the appraisers to the surviving infant children of a widow who dies intestate.
>
> "(2) The appraisers shall state in their appraisement the money or the articles and value of each, set apart by them to the widow or infants, separately from the articles appraised for sale. If the widow or anyone authorized by her in writing is present at the time of the appraisement, she may make her selection out of the property appraised to the amount of $750 and the appraisers shall so report.
>
> "(3) This section applies to cases where the husband dies testate and the widow renounces the provisions of the will as provided by KRS 392.080."

Supplemental to this statute is that part of Kentucky Revised Statutes, section 392.020, which provides:

> ". . . The survivor (of either husband or wife) shall also have an absolute estate in one-half of the surplus personalty left by the decedent."

Subsection (1) (c) of the personal property statute above is applicable only to widows and not to widowers.[54] It has been further stated by the Court that the two sections quoted above do not conflict with one another, as the surplus personalty provided for in 392.020 is that personalty remaining after the debts, funeral expenses, and widow's exemption have been deducted from the estate.[55] As to whether the exemption or the funeral expenses will prevail should the personalty not be sufficient to cover them both, it has been held that the widow's exemption prevails over the claim for funeral expenses.[56] Also property set aside for the widow cannot be subjected to the payment of the debts of the intestate.[57] However, property of the decedent which was attached by creditors of the decedent during his lifetime, and which was not exempt from execution, is not subject to the widow's allowance of $750.[58]

WHO ARE INFANT CHILDREN?

In interpreting the words in the personal property statute, the Court has held that the words "infant children" mean the

[54] Hamilton's Adm'r v. Riney, 140 Ky. 476, 131 S. W. 287 (1910).
[55] Talbott Ex'r. v. Goetz, 286 Ky. 504, 151 S. W. 2d 369 (1941).
[56] Blades v. Blades' Adm'r, 289 Ky. 556, 159 S. W. 2d 407 (1942).
[57] Thompson v. Thompson, 117 Ky. 526, 78 S. W. 418 (1904).
[58] Blake v. Durrell Bros., 103 Ky. 600, 45 S. W. 883 (1898).

children of the intestate and not his stepchildren.[59] By the words "widow and children" it has been said that the legislature intended both the widow and the children to benefit.[60] It has further been held that the legislature intended that the widow should have supervision and control of the exempted property, unless an equitable reason exists to the contrary, such as circumstances, without the fault of the children, which will deprive them of the use of their shares.[61] Such circumstances were found in the *Eversole case,*[62] where the mother was in prison, and in the *Landrum case,*[63] where the property was sold and the mother and sons were no longer able to maintain a home and to enjoy the exempted property together. It has been held, however, that where the widow maintains a home to which the children have access, but the children do not wish to use the home, then the widow is entitled to all of the exempted property.[64]

SHOULD LEGISLATION BE PROGRESSIVE?

Having discussed generally the various sections of the statute of descent and distribution with which this paper is concerned, the general holdings of the Kentucky Court of Appeals upon them, and having imagined some of the situations that are likely to arise under them, let us consider the advisability of changing the order of descent of both real and personal property, as well as the question respecting the point at which representation should cease and the property should escheat to the state, if, in fact, it should escheat.

It is in this matter that we find the greatest amount of diversity in the statutes of the various states. As has been pointed out in this paper many of the states have provisions differing fundamentally from each other in regard to the descent of real and personal property. What should be the governing criteria? It is apparent that the states which make a distinction between the order of descent of realty and personalty, are those that allow the surviving spouse no substantial share in the realty, and yet their legislatures seem to have felt that he should share

[59] Howland's Adm'r v. Harr, 123 Ky. 732, 97 S. W. 358 (1906).
[60] Eversole v. Eversole, 169 Ky. 793, 185 S. W. 487 (1916).
[61] Crain v. West, 191 Ky. 1, 229 S. W. 51 (1921).
[62] *Supra* note 60.
[63] Landrum v. Landrum, 187 Ky. 196, 218 S. W. 717 (1920).
[64] Berger v. Berger, 264 Ky. 229, 94 S. W. 2d 620 (1936).

to some extent and therefore allow him to share to a larger extent in the personalty.[65] The question raised here is: is this a wise or just way to handle the matter? Frankly speaking, does the personal property statute cover up, or compensate for, the defects of the statute on the descent of real property? Perhaps it can be explained by saying that such statutes are a carry over from the common law theory of the descent of real and personal property. A man's wealth in past centuries was principally in land. Feudal burdens fell upon the land owner, in the interest of the feudal overlord. Few men owned personalty of large value, and the stress, therefore, was upon realty where there was tenure. Although the law is properly conservative and slow to change, yet it cannot afford to be so conservative and slow to change that it defeats progressive concepts of social and individual justice. It should be a steadying force in society, should guide it and protect those activities which will make for the security of transactions and the interest of the person; yet it should also be ready to make changes and improvements when the social order requires that changes and improvements should be made. In the situation under discussion, however, the law as it stands, does not appear to be handicapped by wilful legislative neglect, but rather by a legislature whose concern is largely directed to political and economic measures.

The order of descent in the various states is almost as varied as the number of states. This possibly is due to some extent to the difficulty of drawing up a statute which will consider the best interests of the individual and of society in general; perhaps largely to the fact that legislatures throughout the country are too busy with political issues to give adequate consideration to an issue which, in reality, does significantly affect the general interests of the people. ". . . Even pride in the ancestry of these laws no longer argues for their retention, because most of the outgrown provisions of our land law inherited from England have been abolished by that country."[66]

[65] CODE OF ALA. (1940) chap. 16, secs. 1, 10; REV. CODE OF DEL. (1935) secs. 3731, 3847 (wife only); GEN. LAWS OF R. I. (1938) chap. 567, sec. 9 (wife only); VA. CODE ANN. (1942) sec. 5273; W. VA. CODE ANN. (1943) sec. 4089; WIS. STAT. (1943) sec. 318.01.

[66] McCall and Langston, *A New Intestate Succession Statute for North Carolina* (1933) 11 N. C. L. REV. 266.

SHARE OF THE SURVIVING SPOUSE

In regard to the amount the issue and the surviving spouse of a decedent are allowed to take, and at what point in the order of succession they may take, the statutes are capable of being classified to some extent as follows:

(1) A large number of the states provide first for a division of the realty equally among the children of the intestate and their issue by representation.[67]

(2) A number of states allow the surviving spouse to take one half the realty of the intestate absolutely in the first instance if there is only one child or the issue of one child.[68]

(3) A still larger number of states, under varying stipulations, allow the surviving spouse to take one third of all the realty absolutely.[69]

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[67] CODE OF ALA. (1940) chap. 16, sec. 1; STAT. OF ARK. (1937) sec. 4338; REV. CODE OF DEL. (1935) sec. 3731; ILL. REV. STAT. (1937) chap. 39, sec. 1; IND. STAT. ANN. (Burns, 1933) sec. 6-2301; MISS. CODE ANN. (1942) sec. 468; REV. STAT. MO. (1939) sec. 306; REV. LAWS OF N. H. (1942) chap. 360, sec. 1; REV. STAT. OF N. J. (1937) sec. 3:3-2; ORE. COMP. LAWS (1940) sec. 16-101; GEN. LAWS OF R. I. (1938) chap. 567, sec. 1; TENN. CODE ANN. (Williams, 1934) sec. 8380; VA. CODE ANN. (1942) sec. 5264; W. VA. CODE ANN. (1943) sec. 4080; WIS. STAT. (1943) sec. 237.01.

[68] PROBATE CODE OF CALIF. (1937) sec. 221; IDAHO CODE ANN. (1932) sec. 14-103; IND. STAT. ANN. (Burns, 1933) sec. 6-2314 (wife only); MINN. STAT. (1941) sec. 525.16; REV. CODES OF MONT. ANN. (1935) sec. 7073; COMP. STAT. OF NEB. (1929) chap. 30, sec. 101; NEV. COMP. LAWS (Hillyer, 1929) sec. 9859; COMP. LAWS OF N. D. (1913) sec. 5743; OHIO GEN. CODE ANN. (Page, 1938) sec. 10503-4; OKLA. STAT. (1941) chap. 84, sec. 213; PA. STAT. (Purdon, 1936) chap. 20, sec. 1; S. D. CODE (1939) sec. 56.0104; UTAH CODE ANN. (1943) sec. 101-4-5; PUB. LAWS OF VT. (1933) sec. 2951; REV. STAT. OF WASH. ANN. (Remington, 1932) sec. 1341.

[69] PROBATE CODE OF CALIF. (1937) sec. 221; IDAHO CODE ANN. (1932) sec. 14-103; IND. STAT. ANN. (Burns, 1933) sec. 6-2313; ANN. CODE OF MD. (Flack, 1939) art. 93, sec. 129; GEN. LAWS OF MASS. (1932) chap. 190, sec. 1; COMP. LAWS OF MICH. (1929) sec. 13440; MINN. STAT. (1941) sec. 525.16; REV. CODES OF MONT. ANN. (1935) sec. 7072; COMP. STAT. OF NEB. (1929) chap. 30, sec. 101; NEV. COMP. LAWS (Hillyer, 1929) sec. 9859; REV. LAWS OF N. H. (1942) chap. 359, secs. 11, 13; N. Y. DECEDENT ESTATE LAW (Thompson, 1939) chap. 18, sec. 83; GEN. STAT. OF N. C. (1943) sec. 28-149 (widow only); COMP. LAWS OF N. D. (1913) sec. 5743; OHIO GEN. CODE ANN. (Page, 1938) sec. 10503-4; OKLA. STAT. (1941) chap. 84, sec. 213; PA. STAT. (Purdon, 1936) chap. 20, sec. 2; CODE OF LAWS OF S. C. (1942) sec. 8906; S. D. CODE (1939) sec. 56.0104; UTAH CODE ANN. (1943) secs. 101-4-3, 101-4-5; PUB. LAWS OF VT. (1933) secs. 2951, 2964; REV. STAT. OF WASH. ANN. (Remington, 1932) sec. 1341.

(4) Some of the states allow the spouse to take the same share that the children take, dividing it equally among them.[70]

(5) Three states allow the spouse to take all of the property absolutely if there are no issue or their children, and no parents.[71]

(6) A few of the states allow the surviving spouse to take the whole of the realty and personalty absolutely if there are no lineal descendants.[72]

(7) A number of the states give the whole to the spouse if there are no children, parents, brothers, or sisters or their issue.[73]

(8) Two of the states leave out the final category in the grouping above and give the whole to the spouse if there are no children, parents, brothers, or sisters.[74]

There are still other variations as to just when the surviving spouse is entitled to share, the opposite extreme from those already mentioned being found in the statutes of those states, which, like Kentucky, do not allow the spouse to take the land in fee unless there are no other heirs whatsoever.[75]

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[70] FLA. STAT. (1941) sec. 731.23; ANN. CODE OF GA. (Park, 1914) sec. 3931 (unless shares exceed five, then wife takes one fifth), sec. 3930 (husband shares equally with children, per stirpes with their descendants); MISS. CODE ANN. (1942) sec. 470; GEN. STAT. OF N. C. (1943) sec. 28-149 (if more than two children and applicable only to widows); TENN. CODE ANN. (Williams, 1934) sec. 8389 (personalty only).

[71] ARIZ. CODE ANN. (1939) chap. 39, sec. 102; IDAHO CODE ANN. (1932) sec. 14-103; IND. STAT. ANN. (Burns, 1933) sec. 6-2324; WIS. STAT. (1943) sec. 237.01 (whole of realty to surviving spouse if no issue).

[72] COLO. STAT. ANN. (1935) chap. 176, sec. 1; FLA. STAT. (1941) sec. 731.23; ANN. CODE OF GA. (Park, 1914) sec. 3931 (wife only); MINN. STAT. (1941) sec. 525.16; MISS. CODE ANN. (1942) sec. 470; REV. STAT. OF N. J. (1937) secs. 3:3-4, 3:5-3; ORE. COMP. LAWS (1940) secs. 16-101, 16-102.

[73] PROBATE CODE OF CALIF. (1937) sec. 224; COMP. LAWS OF MICH. (1929) sec. 13440; REV. STAT. MO. (1939) sec. 306; REV. CODES OF MONT. ANN. (1935) sec. 7073; N. Y. DECEDENT ESTATE LAW (Thompson, 1939) chap. 18, sec. 83; UTAH CODE ANN. (1943) sec. 101-4-5; VA. CODE ANN. (1942) sec. 5264.

[74] ILL. REV. STAT. (1937) chap. 39, sec. 1; OKLA. STAT. (1941) chap. 84, sec. 213.

[75] REV. CODE OF DEL. (1935) sec. 3731; REV. STAT. OF ME. (1930) chap. 89, sec. 1; GEN. LAWS OF MASS. (1932) chap. 190, sec. 3; CODE OF LAWS OF S. C. (1942) sec. 8906; TENN. CODE ANN. (Williams, 1934) sec. 8382 (realty only).

SOME OF THE PROBLEMS INVOLVED

Which of the above groupings would seem to be best? Should the surviving spouse be considered in the first instance? Are the vast majority of the states progressive when they make provision for the issue and their descendants in the first instance, without also considering the spouse? All sorts of situations can be imagined which make it very difficult to draw up a fair and impartial statute. Suppose the surviving spouse is the spouse of a second or later marriage? Suppose still further that there are children by several marriages? Is there any reason to distinguish between realty and personalty, between husband and wife? Is there any reason to allow all possible relations to take, even the fifty-second cousin, in preference to the state? Finally, we might ask, should the size of the estate have any bearing upon the matter?

WHAT RELATIONS SHOULD BE PERMITTED TO TAKE?

It would seem to this writer that perhaps it is best to permit only the close relations to share in the estate of an intestate. All lineal descendants should certainly be permitted to share, and the lineal ancestors through the parents and possibly through the grandparents. While it is difficult to know at exactly what point collaterals should be cut off, it is believed that it need not go further than the grandchildren of brothers and sisters, and that ascending collaterals should not share. In the large majority of the cases, relations beyond these degrees are not close to the decedent nor dependent upon him. In fact, they may not even have been known to him, or have had any interest in him or in his affairs, and should not therefore, take under a statute of descent, there being a more deserving and more needful heir at hand, namely the state.

"As the German's pungent phrase, *'der lachende Erbe'* (the laughing heir), so aptly indicates, succession by one who is so loosely linked to his ancestor as to suffer no sense of bereavement at his loss arouses a certain resentment in society. His good fortune is begrudged as undeserved."[76] It is beyond controversy that the American family is growing smaller and

[76] Cavers, *Change in the American Family and the "Laughing Heir"* (1934) 20 IOWA L. REV. 203, 208. This is a very timely and worth-while article.

that its ties are fewer and looser than they were even fifty years ago. If we attempt to cling to our outmoded statutes and allow all next of kin to share in a decedent's estate, we are going to run into grave difficulties in regard to proof of relationship and the locating of kin who may live in distant corners of the world, as they well may with the world growing ever smaller due to the rapid advancements which are taking place in transportation and communication and to the human being's desire for that excitement and adventure which he finds when he discovers new places and new faces. "Another argument, which would not be without weight to those who deal in real estate, is that a restriction of the class of those entitled to succession would remove an important source of uncertainty in titles to land. . . . Investigations to determine those entitled to succession may be costly, and the internecine strife among competing claimants often delays the settlement of the estate. . . ."[77] Finally, to use the words of Professor Cavers, ". . . it is my belief that there are in process changes in the structure of the American family which, coupled with considerations of convenience, will force to the fore the question of the desirability of drastic limitations on the right of remote kindred to succession upon intestacy."[78]

ESCHEAT

Regarding the matter of escheat in relation to the statutes on descent of intestate property the states fall into several rather clearly marked categories, as follows:

(1) Many of the states have provided that property which is not claimed under the statute of descent should escheat to

[77] *Id.* at 211.

[78] *Id.* at 205. Professor Cavers gives a pointed illustration from life which argues strongly for the wisdom of cutting off remote heirs. "Miss Wendel, an elderly recluse whose family had amassed a fortune in New York realty, died in 1931, leaving the bulk of her fortune to charity. Her executors in filing her will stated that she left no relatives. . . . Some 2300 persons strove to establish themselves as entitled to join in the assault on her will. In June, 1933, four claimants, conceded to be relatives in the fifth degree, accepted $2,000,000 in consideration of their agreement not to contest the will. They are believed to have agreed to share this sum with sixty or seventy relatives in the sixth, seventh, and eighth degrees. . . . One claimant was convicted for having fabricated evidence that he was the testatrix's brother's son, and Surrogate Foley referred the activities of six other claimants to the Grievance Committee of the Bar Association." *Id.* at 210, n. 16.

the state, but permit all next of kin to claim it before it does escheat.[79]

(2) Maryland provides that property shall escheat if there are no relations within the fifth degree.[80]

(3) A few states have specifically provided that property shall escheat to the state for the school fund, if there are no next of kin to inherit.[81]

(4) There are, apparently, courts which assert presumptions against the escheating of property to the state.[82] It is the belief of this writer that much good could be done by allowing property to escheat to the state when there are no close relations of the intestate to inherit. As to whether it is wise to limit the property which escheats to the state to use in some special fund, or is best to permit it to go into the general funds of the state is difficult to answer and beyond the scope of this paper.

COMMUNITY PROPERTY

The states in which community property is recognized, have special statutes in regard to the descent and distribution of it.[83] Property in Kentucky is not held in this way and it is

[79] CODE OF ALA. (1940) chap. 16, sec. 1; PROBATE CODE OF CALIF. (1937) sec. 231; GEN. STAT. OF CONN. (1930) secs. 4997, 4998; FLA. STAT. (1941) sec. 731.33; IDAHO CODE ANN. (1932) sec. 14-118; ILL. REV. STAT. (1937) chap. 39, sec. 1; CODE OF IOWA (1939) chap. 508, sec. 12035; GEN. LAWS OF MASS. (1932) chap. 190, sec. 3; COMP. LAWS OF MICH. (1929) sec. 13440; MINN. STAT. (1941) sec. 525.16; REV. CODES OF MONT. ANN. (1935) sec. 7073; COMP. STAT. OF NEB. (1929) chap. 30, sec. 102; NEV. COMP. LAWS (Hillyer, 1929) sec. 9859; COMP. LAWS OF N. D. (1913) sec. 5743; OHIO GEN. CODE ANN. (Page, 1938) sec. 10503-4; OKLA. STAT. (1941) chap. 84, sec. 213; ORE. COMP. LAWS (1940) sec. 16-101; PA. STAT. (Purdon, 1936) chap. 20, sec. 137; S. D. CODE (1939) sec. 56.0104; UTAH CODE ANN. (1943) sec. 101-4-5; REV. STAT. OF WASH. ANN. (Remington, 1932) sec. 1356; W. VA. CODE ANN. (1943) sec. 4090 (personalty); WIS. STAT. (1943) secs. 237.01, 318.03.

[80] ANN. CODE OF MD. (Flack, 1939) art. 93, sec. 143.

[81] COMP. LAWS OF MICH. (1929) sec. 13440; S. D. CODE (1939) sec. 56.0104; UTAH CODE ANN. (1943) sec. 101-4-5; WIS. STAT. (1943) secs. 237.01, 318.03.

[82] Danks v. Herrmann, 94 Colo. 546, 31 P. 2d 912 (1934); Dutton v. Donahue, 44 Wyo. 52, 8 P. 2d 90 (1932).

[83] ARIZ. CODE ANN. (1939) chap. 39, secs. 101, 102 (on separate estate) and chap. 39, sec. 109 (on community property); PROBATE CODE OF CALIF. (1937) secs. 201, 202, 203 (on community property) and secs. 221–231 (on separate estate); IDAHO CODE ANN. (1932) sec. 14-103 (on separate estate) and sec. 14-113 (on community property); NEV. COMP. LAWS (Hillyer, 1929) sec. 9859 (on separate es-

submitted by the writer that it would not be wise to adopt that system; however, it is interesting to note that the statutes in the states which do recognize community property vary almost as greatly as do the other statutes on descent. In California, for instance, one half of the community property belongs to the surviving spouse, and also the other half, although it is subject to the debts and the testamentary disposition of the first spouse to die.[84] On the other hand, in New Mexico, a distinction is made between the husband and the wife, the surviving husband receiving the entirety subject to such portion as may have been set apart to the wife by a judicial decree,[85] while the surviving wife receives only one half of the property, the other half being subject to the testamentary disposition of the husband, or that failing, the wife is allowed one fourth the husband's half, the remainder going in equal shares to the children.[86] Differing from either of the two mentioned above, is the Washington statute which gives one half of the community property to the surviving spouse subject to debts, the other half descending equally to the issue of the decedent or to their representatives.[87]

DISTRIBUTION BASED UPON WHICH SPOUSE SURVIVES

Of importance in all states is the question of whether there should be any distinction between the share the spouse takes depending upon whether it is the husband or the wife that survives. While some of the statutes still do make a distinction,[88] it would seem that they are very definitely in the minority and that their statutes are mere survivals of a past age. We have come a long way from the days of feudalism. Married women are no longer looked upon as being handicapped by that relational and mental incapacity which they were once considered to possess. They may now own property in their

tate) and secs. 3364, 3365 (on community property); N. M. STAT. ANN. (1941) secs. 31-108, 31-109, 31-116 (on community property) and secs. 31-110, 31-111, 31-112, 31-113, 31-114, 31-115 (on separate estate); TEX. STAT. (Vernon, 1936) secs. 2570, 2571 (on separate estate) and secs. 2578, 2579 (on community property); REV. STAT. OF WASH. ANN. (Remington, 1932) sec. 1341 (on separate estate) and sec. 1342 (on community property).

[84] PROBATE CODE OF CALIF. (1937) secs. 201, 202, 203.

[85] N. M. STAT. ANN. (1941) sec. 31-108.

[86] *Id.* sec. 31-109.

[87] REV. STAT. OF WASH. ANN. (Remington, 1932) sec. 1342.

[88] REV. LAWS OF N. H. (1942) chap. 359, secs. 11, 13; GEN. STAT. OF N. C. (1934) sec. 28-149.

own names and contract as *femmes soles* in regard to it. Why should the husband be allowed a greater interest in his wife's property than she in his? While many women have gone into business on their own, there is still a vast majority of them that would find difficulty in readjusting themselves from housekeepers to wage earners, should they be left without any property or means of support. The greater number of women who are left widows, in normal times, are women who have passed the prime of life and so would find it rather difficult to learn some occupation that would fit them for a position. While this is true it would seem that the wife should not receive any greater share of her husband's estate than he receives from hers; but rather, it appears that the husband and wife should share equally in the estates of one another. Specifically, it is believed that Kentucky Revised Statutes, section 391.030 subsections (1) (c), (2), and (3) or any similar statute enacted in their place, ought to be for the benefit of the husband as well as for the wife.[89]

PROPOSALS FOR DISTRIBUTION

Of no little difficulty is the problem of setting up an order of descent which will be fair to all persons concerned. It is believed that the size of the estate, whether or not there are issue, second or later marriages, and if there are no issue, the nearness or remoteness of the next of kin, should be considered. Statutes should not be so long and cumbersome that they serve no other purpose than to cause litigation, but a clear and somewhat detailed statute upon the subject of descent would be an improvement and benefit both socially and to the individual.

It is the opinion of this writer that the surviving spouse ought to be considered in the first instance. A number of the states allow the spouse, where there are no issue, to take a lump sum, or property equivalent to a given sum, plus a given fraction of the surplus above that sum, the remainder passing in specified ways.[90] As do all other statutes on descent, these

[89] *Supra* pages 280-281.

[90] CODE OF IOWA (1939) chap. 508, sec. 12017; GEN. LAWS OF MASS. (1932) chap. 190, sec. 1; COMP. LAWS OF N. D. (1913, as amended 1915) sec. 5743; PA. STAT. (Purdon, 1936) chap. 20, sec. 11; S. D. CODE (1939) sec. 56.0104; UTAH CODE ANN. (1943) sec. 101-4-5; PUB. LAWS OF VT. (1933) sec. 2966; WYO. REV. STAT. ANN. (1931) sec. 88-4001.

vary in their terms from state to state. Iowa, for instance, gives to the surviving spouse, if there are no issue, the whole estate to the value of $7500 after the payment of debts, and one half of all of the estate in excess of this amount, the remaining one half of the excess going to the parents.[91] Massachusetts is not so liberal, giving to the spouse the whole of the estate if it does not exceed $5000 in value, otherwise allowing him the $5000, plus one half of the remaining real and personal property.[92] North Dakota, on the other hand, is more generous, allowing the surviving spouse all of the estate if it does not exceed $15,000 in value, plus one half of all property above the allowance, the remainder going equally to the parents or the survivor of them, or if neither of them is living to the brothers and sisters and their issue by representation.[93] South Dakota's statute is identical with the one of her sister state to the north except that she allows the surviving spouse $20,000 rather than $15,000.[94] This serves to indicate the difficulty that has been found in fixing a sum or value that will be judicious in all cases. In spite of the difficulty involved, it appears to this writer that it would be a logical and practical system to initiate and develop, as situations change, not only in Kentucky, but in all of the states which do not have it. Why could not this system be worked out in detail to apply both where there are and are not children or issue and also to cases where there is a second or later spouse?

The following situations and solutions occur to this writer; and are submitted as an outline or guide in drawing a new statute upon the subject.

(1) If there is a first spouse, but no children or issue of children, it does not seem unjust to permit the surviving spouse to inherit absolutely all of the real and personal property earned during coverture, subject, of course, to debts, plus one half of the residue, not so earned, the other one half going to the parents, or the survivor of them, or if none, to the brothers and sisters and their descendants, *per stirpes,* or if all are in the

[91] *Supra* note 90.
[92] *Id.*
[93] *Id.*
[94] *Id.*

same degree of relationship to the decedent, *per capita.* (See above as to cutting off representation.)[95]

(2) If there is a first spouse and issue, the spouse could be given a lump sum, say, for example, $10,000, in addition to the home and furnishings of whatever value, plus a life interest in all of the residue, the remainder being divided equally among the children and their issue by representation, unless all are in the same degree of relationship, in which case they should take *per capita.* It would appear to be wise to allow the spouse a power of sale and of reinvestment should necessity and sound discretion require it in order to preserve the value and best interests of the estate. Of course, there are various views upon the matter, but, generally speaking, it can be said that husband and wife accumulate property, often through their joint efforts, not only for their own benefit and pleasure during their lives, but also with an eye towards the benefit and aid of their issue. Thus a life interest only, in the surviving spouse in all of the estate above a given sum and the home would seem likely to fulfill their wishes.

(3) If there is a second spouse and no children or issue by either marriage, but parents, or brothers or sisters of the intestate or their issue, there seems to be no sound reason for not following the same provisions as set forth by this writer under the first section in this list.

(4) If there is a spouse, but no children as issue, and no parents, brothers or sisters or their descendants, all should go to the spouse regardless of the source.

(5) If there is a second spouse and issue surviving by the first spouse, it would appear to be socially expedient to allow the spouse a certain sum absolutely with a life interest in the home if acquired during the first marriage of the decedent, otherwise an absolute interest, and a given percentage of the residue depending upon its size, and during which marriage it was acquired, the remainder going equally to the children and their issue *per stirpes,* or *per capita,* if all are in the same degree of relationship. As in the case of a first spouse it would seem to be proper to allow the spouse only a certain percentage of the property which the decedent acquired before marriage, the residue passing to the issue of the first marriage.

[95] *Supra* pages 274-276.

(6) If there is a second spouse and issue by both marriages, the spouse should be allowed a given sum absolutely as above, the home if acquired during that marriage, with a life interest in all of the residue earned during the marriage, the remainder passing equally to all of the issue of both marriages. As in the case of a first spouse the second or later spouse should be entitled to a given percentage of the estate acquired before marriage, the residue passing to the issue.

CONCLUSION

To tie all of the many loose ends of this paper together, it is submitted that in view of the developing times and the great number of persons that are involved, that the several sections of the Kentucky statutes on the descent and distribution of intestate property should be completely revised. Specifically, it is believed that there is no sound reason to distinguish between real and personal property, but rather that one statute which would cover the two would be sufficient. It would also seem that states which make no distinction in the descent of property because of its source of inheritance have the proper provisions upon that matter, that all property, regardless of whether it is ancestral or not, should follow the same order of descent. It appears further that there should be no distinction between those of the whole blood and those of the half blood, whether or not the claimants are lineal or collateral relations of the intestate.

Perhaps the section most in need of change is that respecting *per stirpes* distribution. Certainly if those who are to take under the statute are all in the same degree of lineal relationship to the intestate they should all share equally in his estate, and *per stirpes* distribution should be limited to cases in which the next of kin are not in the same degree of relationship to the decedent. It may be that collateral inheritance should follow the same rule in all respects. Whether a nephew should be preferred to an uncle raises a question of the priority of one *stirpes* over another rather than that of distribution *per capita.*

Finally, and most important, the order of succession should be carefully considered and revised. It is submitted that a graduated scale which would take into consideration the size of

the estate and the heirs who are to inherit, whether there is a spouse with no issue or parents surviving, or whether there are issue, or perhaps a second or later spouse. Equitably, doubtless both the issue and the surviving spouse should be considered in the first instance and it should make no difference in the order or amount allowed whether it is the husband or the wife that survives. If there are no issue but there are parents and a spouse surviving, it would seem just to allow the parents a portion of the estate, the size of such portion depending upon the size of the estate, and the amount of it acquired during the marriage. (In all situations this should be a consideration.) If there are no parents or issue and the estate is relatively small, then the spouse should take all. On the other hand, if the estate is large and a spouse and brothers and sisters survive but no parents or issue, perhaps they should all share, the spouse taking the largest portion. If there is no spouse, the issue should inherit the entire estate, it being distributed equally between them; or if some are deceased and leave issue surviving them, then the issue should share *per stirpes* with the surviving children of the intestate, but *per capita* among themselves. If there are no issue and no spouse then the parents and the brothers and sisters and their issue should share their portions, depending to some extent upon the size of the estate. It would seem that the parents should be preferred to the brothers and sisters. Lastly it is firmly believed that schools, colleges or state supported eleemosynary institutions could be benefited greatly if the state were by statute made an heir in preference to remote relations. Where the relationship is less remote it might be wise and equitable to allow the court a certain amount of discretion in apportioning the shares. In such case the court may be able to make apportionments in the light of the needs and deserts of the claimants in the exercise of a wise discretion and under appropriate rules and safeguards.

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